

## **MINUTES**

### **ADVISORY COMMITTEE ON CIVIL RULES**

**APRIL 28 AND 29, 1994**

The Advisory Committee on Civil Rules met on April 28 and 29, 1994, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure, as did Chief Judge William O. Bertelsman as Liaison Member from that Committee and Professor Daniel R. Coquillette as Reporter of that Committee. Chief Judge Paul Mannes, Chair of the Advisory Committee on Bankruptcy Rules, and Judge Jane A. Restani, a member of that Committee, also attended. Parts of the meeting were attended by Judge William W. Schwarzer, Joe S. Cecil, John Shapard, Elizabeth Wiggins, and Thomas E. Willging of the Federal Judicial Center. Peter G. McCabe, John K. Rabiej, Mark Shapiro, Judith Krivit, and Joseph F. Spaniol Jr., were present from the Administrative Office. Observers included Kenneth J. Sherk, Esq., and Alfred W. Cortese, Jr., Esq.

### **HEARING**

The meeting began with a hearing on the proposals to amend Civil Rules 26, 43, 50, 52, 59, 83, and 84 that were published for comment on October 15, 1993.

Alfred W. Cortese, Jr., Esq. testified on the Rule 26(c)(3) proposal, supporting the amendment as a restatement of current good practice. He provided a history of the public perception that protective orders may defeat public access to information important to protect public health and welfare, and of the efforts that have been made over the past five years to enact state legislation in this area. Some states have adopted statutes or court rules that increase public access; many have failed to act on similar proposals. Washington passed a broad statute and then cut it back. Experience with the Texas rule has shown that it is very difficult to administer. The standards also are difficult to apply; in determining whether there is a public hazard, the judge may seem to be prejudging the merits of the case. He urged that much of the drive for increased access is based not on a need to inform the public of important issues - full information is presently available to protect against any significant hazards - but on the desire for publicity. The examples often given of thwarted public

interests do not hold up on close scrutiny. The frequently-cited example of a 1984 breast implant lawsuit that concluded with an order denying access to information now thought important is not persuasive because there was a full trial that was fully open to the public, including disclosure of all the information later claimed to have been suppressed by the subsequent protective order. He also offered an example of the need for protection in a case in which a new drug application was introduced at trial over objection, including "boxes and boxes" of information that no one even looked at during trial. After a verdict for the defendant, the trial court concluded that there must be public access to the information since it had been introduced at trial; this order was reversed on appeal. Public regulators have ample power to uncover information needed to protect the public; there is no need to make any special provisions for disclosure to them. Most of the information that proponents of new rules seek is not information that is appropriately submitted to regulatory agencies in any event; instead, it is the stray comment, the incidental observation in casual documents that appears "hot" and "news-worthy." He also urged that the Committee should not undertake to address the problems of sealing orders outside the context of protective discovery orders. What needs to be done is to sensitize judges to the need to consider the public interest, not adoption of a formal rule. He recognized, however, that there might be some benefit in a rule codifying present practice by requiring "good cause" for sealing orders. Some legislation now pending in Congress treats discovery protective orders and more general sealing orders in one package. In response to questions, he observed that a court can order perpetual sealing; that the proposal makes adequate provision for access by parties in parallel litigation; and that in any event a protective order in one case does not have any effect on efforts to obtain the same information by independent discovery undertaken in a different case.

Jack Chorowsky, Counsel of the United States Senate Committee on the Judiciary, also testified. First, he noted that there has not been active consideration and rejection in most of the states that have failed to act on proposals for increased public access to litigation information. There has been only a failure to act. Next, he stated that an article will soon appear in the Texas Law Review reviewing experience with Texas Rule 76a, concluding that litigation about application of the rule is confined to a small minority of cases. In most cases, the parties stipulate to the absence of a health or safety concern. Turning to the breast implant example, he noted that a single untoward example should not be cause for legislation, but that this example was troubling. When the FDA did have hearings, an expert familiar with the first litigation testified that the sealing order barred him from testifying on the merits. Many troubling examples arise from discovery and settlement, not access to trial records. And public

regulatory agencies cannot demand production of information they do not know about; they are not adequately staffed to follow all litigation all around the country. There is a need to scrutinize carefully the extent of the possible problems with protective orders. There is a view that they are desirable because they facilitate discovery. More often than not, however, "good cause" is not shown - the parties stipulate, or the judge simply orders protection. Even if the primary purpose of litigation is to resolve private disputes, it is wrong to conclude that courts have no role in protecting the public interest. There is only anecdotal information about harms to public interests, much of it arising from automobile crash litigation including such matters as the risks of rear-seat lapbelts, sidesaddle gas tanks, and crash-testing. Perhaps courts should not be required to inquire into every stipulated protective order, but at least the parties should be required to stipulate that there is no public interest involved. The bill now pending in fact would require the court to make findings in each case. And courts will be able to administer a "public health or safety" standard.

Stephen Yagman, Esq., testified on Rule 83. He would oppose any action that might weaken the requirement that orders by individual judges be consistent with the Federal Rules and local rules. His own experience litigating 42 U.S.C.A. § 1983 actions in a small firm shows that there are far too many standing orders, as set out in his written statement. It is very difficult to achieve effective review of standing orders by an appellate court. The rule should be further amended to provide effective means of enforcement. It is not clear what authority the Judicial Council of a Circuit has to review standing orders under 28 U.S.C. §§ 332 and 2071. Perhaps a committee of judges should be established in each district to review the standing orders of that district on an ongoing basis. He also urged that Rule 30 should be amended to allow the attorney taking a deposition to administer the oath or affirmation, saving the cost of having a court reporter attend. Finally, he urged that Rule 45 should be amended so that attendance of a party at trial could be compelled by notice, without need to resort to a subpoena.

#### MEETING

The meeting began after the hearing concluded. Judge Higginbotham welcomed Judge Stotler and noted that the press of other duties has led Chief Justice Holmes to resign as a member of the Committee.

The draft minutes of the October, 1993, and February, 1994 meetings were approved with corrections.

#### *Comments on Proposed Rules*

The meeting began with review of written comments on the proposed Rules amendments published on October 15, 1993.

*Rule 26(c)*

The comments and discussion on Rule 26(c) focused on proposed Rule 26(c)(3). None of the comments addressed the style changes made in the earlier portions of current Rule 26(c). Discussion of the comments focused on three main themes: the continuing paucity of systematic empirical evidence about the use, modification, and effects of protective orders; the intention of the Committee as to the meaning of the 1993 proposal; and the role that civil litigation may properly play in serving public interests beyond the resolution of the underlying private dispute.

The discussion began with a summary of a recent hearing on S. 1404 before Senators Kohl, Cohen, and Simon. The first panel provided testimony by victims of product injuries, including the parents of a person killed by an alleged design defect in an automobile transmission and a breast implant patient. The gist of the testimony was that these injuries might have been avoided had there been public access to information shielded by protective orders in litigation occurring before the injuries.

The second panel included Chief Judge Mikva, Judge Higginbotham, and two practicing lawyers. Chief Judge Mikva testified that the subject of protective orders is properly one to be addressed through the public processes of Congress, not the Rules Enabling Act process. Judge Higginbotham stressed the need for cooperative work involving both Congress and the Civil Rules Advisory Committee. He noted that one of the issues troubling Congress is the difficulty of acquiring solid empirical information through the Advisory Committee process.

Initial discussion repeated the earlier Committee observations that protective orders have become common. There is a continuing sense that most ongoing practice is proper and desirable. It also is accepted that — as in virtually every other area of practice — there are occasional unwise uses of protective orders. The problem is to find a way to deal with a small number of misuses without doing damage to the larger area of proper practice.

Discovery protective orders are closely related to orders that seal court records, but are distinctively different. Another dimension of the problem is to find ways of understanding the differences and translating them into a good discovery rule. Material initially subject to a protective order, for example, may be used in support of a dispositive motion or at trial. Once the information is used in such settings, access should be governed by the procedures that govern court records, not those that govern

discovery materials. To the extent that proposed legislation mingles discovery materials with other materials, it should be clarified. The general topic of access to court records was addressed again, briefly, in connection with the sketch of a possible Rule 77.1 noted below.

The purpose of the proposal as published was described by several members of the committee as confirmation of present law in the sense of the general and better practice. This purpose seemed well reflected in many of the public comments. Some questioned the need to adopt a rule that simply confirms current practice. Others thought it sensible to confirm current practice as a means of stabilizing practice and making it more uniform. Still others challenged the proposal as not going far enough. The range of comments itself was taken as evidence of the great importance of the topic and the need to think carefully about it.

One topic not addressed by the proposal is the standard for issuing an initial protective order. Some of the comments addressed this omission, suggesting that the standard should be amended to require consideration of public health and safety. Some members of the committee expressed the view that the present rule has worked effectively and that the standard for issuing an initial protective order should not be changed.

The question of reliance on a protective order was addressed in the public comments, some believing reliance an important consideration and some urging that reliance is irrelevant to modification or dissolution.

Some concern was expressed that it is inappropriate for a party to secure sweeping discovery under a protective order that limits use of the discovery materials and then switch fields by arguing that public health or safety require dissemination of the materials. A request for access by a nonparty might be different, at least if it were clear that the nonparty request had not been stimulated by a party. A response to this distinction was ventured that a nonparty who has a legitimate litigating need for information should file suit and undertake its own discovery. A different response was that these questions are genuinely complex. There is a strong pressure on counsel to do whatever best facilitates disposition of the immediate case. Protective orders and related confidentiality agreements can expedite discovery and also can ease the way to settlement. Once the fruits of discovery have been uncovered, however, there may come a new realization that the dispute involves issues that could affect other litigation or the general public.

The philosophy of discovery in relation to private civil litigation also came under consideration. Deep divergences of

viewpoints were recognized. One polar view is that public judicial means of dispute resolution are made available solely for the purpose of resolving private disputes that the parties have been unable to adjust by other means. The only purpose of providing discovery is to support as accurate a decision as possible. For this purpose, courts exert official power to compel disclosure of much information that is not subject to any other means of coerced public disclosure. Civil litigation should not become encumbered with attempts to serve more general public interests in disclosure. If there is some alternative means of compelling disclosure, that means should be pursued, whether it is discovery in other litigation, demand by public regulatory enforcement agencies, or something else. Protective order practice was expanded by the 1970 discovery amendments as a trade-off for sweeping discovery, to ensure that discovery is limited to the private needs of particular litigation. The opposite polar view is that courts are public agencies, and everything a court does is affected with a public interest. If public process is used to force disclosure of information, the information becomes public and access should be limited only for reasons that would justify sealing motion materials or a trial record.

The impact of the proposed amendment was reviewed against this background. It was suggested that it may make discovery material more readily available, and that this may create more problems than it solves. Procedures designed for deliberate pursuit of the "public interest" could prove dangerous. A civil litigation system developed for private dispute resolution could be bent in directions that would cause some litigation to be brought to foster generation of new disputes, not to resolve old ones. The same developments could drive other parties seeking only dispute resolution away from the courts to other means. Still others might capitulate, abandoning claim or defense as a means of avoiding discovery. This suggestion returned discussion to the question of the purpose of the proposal and the unintended effects it might have.

Unintended effects might flow from the explicit recognition of power to modify or dissolve, particularly when built into a structure that makes reliance simply one factor to be considered in acting on a request to modify or dissolve. Counsel advising a client about the consequences of discovery may be even more careful to make clear that it is risky to rely on a protective order in determining whether to resist discovery of information that may be outside the scope of discovery or protected against discovery. The public comments reflect the prospect that unintended effects may be attributed to the proposal.

One possible response to the risk that the proposal would have unintended consequences would be to delete the explicit statement

of the power to modify or dissolve. It was moved that the proposal be amended by deleting the first sentence and incorporating portions of it in the second sentence. As revised, the first sentence would read: "In ruling on a motion to dissolve or modify a protective order, the court must consider \* \* \*." Deletion of the reference to a motion might have some impact on the freedom with which courts act on their own initiative, but it was not intended that the published proposal cut off the power to act without motion. After discussion, it was decided by vote of 6 to 4 that the language should not be changed.

The discussion of the need for a motion also addressed the question of "standing" to seek modification or dissolution. It was supposed that the draft language does not change present practice, that a nonparty would be allowed to seek access in the same circumstances as now support a nonparty request. The question was recognized as a difficult one that deserves further consideration.

The public comments suggested many possible changes in Rule 26(c). One that was picked out for discussion was incorporation of an explicit reference to changes in circumstances between initial issuance of a protective order and the time of a motion to dissolve or modify. No conclusion was reached as to this suggestion.

Another question raised by the public comments is whether it is feasible to administer a test that looks to public health and safety. During the early phases of discovery, when protective orders are most likely to be important, it may be difficult to get behind plausible assertions of a threat to public health or safety. Efforts to determine the question may take on aspects of a preliminary trial. If protection is denied, prospects of settlement may be diminished because publicity drives the defendant to seek vindication by judgment. Again, no conclusion was reached as to this concern.

Discussion then turned to the proper course to take on the present proposal. It was noted that protective discovery orders have been caught up in the more general debate about access to court records, often without distinguishing the differences between discovery information and materials that have been submitted for consideration and action by a court. Congress and many state legislatures have undertaken active consideration of these topics, and it is important to develop some means of integrating the work of the Advisory Committee with the work of Congress. The single most important question, moreover, remains a matter of competing anecdotes. There still is no systematic empirical evidence to show whether legitimate and significant needs for public access to discovery information are often defeated by protective orders. Protective orders do much good. But if they also cause much harm, some means must be found to preserve most of the good and avoid

most of the harm.

The desire for more reliable information about the effects of discovery orders turned discussion to the first tentative results of a Federal Judicial Center study of protective order activity in the United States District Court for the District of Columbia. Elizabeth Wiggins presented the results, showing a substantial rate of protective order activity, more often involving contested motions than stipulations. At least these preliminary results suggest the need to examine the common belief that "most" protective orders result from agreement among the parties. Approximately 20% of the orders and stipulations included express provisions governing the reasons for vacating the protection.

After discussion of the first findings, unanimous approval was given to a motion that the Federal Judicial Center be asked to broaden the protective order study. Committee members will work with Judicial Center staff to help frame the study. It is hoped that results will be available in time for the October meeting of the Committee. Protective order questions will be considered again at that meeting.

In addition to the Federal Judicial Center study, information also will be sought by seeking to work with the committees and staff of Congress. The importance of working with Congress was stressed repeatedly.

*Rule 43(a)*

There was no further discussion of the proposal to strike from Rule 43(a) the requirement that testimony be taken "orally."

The proposal to authorize presentation of testimony by transmission from a different location was discussed at some length. The opening observation was that there is a risk of overuse - that "virtual reality courtrooms" are dehumanized and remote. It was suggested that the text of the proposed amendment be changed to limit use of remote transmission to exceptional circumstances. It was agreed that if the text is not changed, the Note should be revised to include a clear statement that live testimony is preferable. Remote transmission is not to be allowed lightly. It also was agreed to delete from the Note the reference to transmission of testimony by printed words.

A motion to send Rule 43(a) forward to the Standing Committee, with the proposed changes in the Note, failed by an even vote of 5 to 5.

*Rules 50, 52, and 59*



Discussion of the proposed amendments to Rules 50, 52, and 59 focused in part on the history of the proposal. Each rule now sets 10 days as the period for these post-trial motions, but the period is allowed variously to "serve" the motion, to "file and serve" the motion, or to "make" the motion. The Bankruptcy Rules Committee suggested that the rules be changed so that each allows 10 days from entry of judgment to file the motion. This suggestion drew from the desire to further integrate bankruptcy practice with practice under the Civil Rules. A parallel change has been proposed for Appellate Rule 4. Filing was chosen as the requirement because ordinarily it is an objective phenomenon that can be easily verified at the clerk's office. Some concern was expressed with the difficulty of accomplishing timely filing by lawyers located in remote areas.

It was urged on behalf of the Bankruptcy Rules Committee that the Note to Rule 59 should be revised by adding the information that Bankruptcy Rule 9006(a) treats "intervening Saturdays, Sundays, and legal holidays" differently than Civil Rule 6(a). This request was adopted.

A motion to send Rules 50, 52, and 59 to the Standing Committee for approval, with the addition to the Rule 59 note, was adopted.

#### *Rule 83*

The Bankruptcy Rules Committee recommended that the proposed Rule 83(a)(2) reference to "negligent" failure to comply with a local rule requirement of form be changed to "nonwillful." The change reflects the prospect that read literally, the proposal would not reach an unavoidable failure to comply. The Committee accepted this recommendation without dissent.

The discussion of proposed Rule 83(b) focused on the question whether it might be possible to do something more effective to restrict or eliminate standing orders. Several Committee members thought it would be desirable to reduce drastically the use of standing orders. It was noted, however, that past efforts to reduce even the use of local rules have proved difficult; efforts to reduce the use of individual judge standing orders seem all the more likely to prove difficult.

A motion to send Rule 83 to the Standing Committee for approval was adopted.

#### *Rule 84*

Discussion began with the proposal to add a new Rule 84(b). It was suggested that the proposal is ultra vires. The Rules

Enabling Act authorizes adoption of rules of procedure by a process that includes submission to the Supreme Court and transmittal to Congress. It cannot be utilized to adopt a rule that would allow changes in the rules, however slight, by a process that eliminates consideration by the Supreme Court and Congress. The fact that the Supreme Court and Congress would participate in the process of adopting the proposed Rule 84(b) is not sufficient to cure the defect of authority.

In response to this concern, it was noted that the Bankruptcy Rules Committee has opposed adoption of proposed Bankruptcy Rule 9037, which would parallel Rule 84(b), on ultra vires grounds. The Appellate Rules Committee has approved the similar Appellate Rule 49, and the Criminal Rules Committee has approved the similar Criminal Rule 59(b).

Doubt also was expressed about the wisdom of testing the outer limits of Rules Enabling Act authority. Even if adoption of proposed Rule 84(b) and parallel provisions in other sets of rules might be authorized, the need is not so great as to justify the test.

A motion was approved to report to the Standing Committee the belief of this Committee that proposed Rule 84(b) is ultra vires.

Discussion of the proposal to amend Rule 84(a) to authorize the Judicial Conference to adopt, revise, or delete forms in the Appendix followed the discussion of proposed Rule 84(b). The ultra vires objection was thought less fundamental, since the forms are only sufficient but not controlling. Nonetheless, it was concluded that this proposed change also is ultra vires the Enabling Act. On motion it was decided to report this conclusion as well to the Standing Committee.

Finally, it was concluded that it would be desirable to adopt the Rule 84(a) and (b) proposals by legislation, so long as it is made clear that the Judicial Conference is to act through the Standing Committee and relevant advisory committees. A motion to adopt this conclusion passed unanimously.

#### *Legislative Report*

Brief note was made of a few pending legislative proposals that would affect the Civil Rules.

Discovery protective order legislation was discussed in connection with proposed Rule 26(c)(3).

S. 585 includes an offer-of-judgment provision. The Senate has been advised that the Judicial Conference has withdrawn its

support in principle of such legislation.

Proposed amendments of Rule 11 in the National Competitiveness Act seem to have been defeated, at least for the time being.

S. 1976 contains a substantial number of class action provisions that would apply to implied causes of action under the Securities Exchange Act of 1934. The provisions will deserve consideration in the course of the Committee's ongoing study of Rule 23.

### *Ongoing Rule Proposals*

#### *Rule 23*

The discussion of Rule 23 began with a panel of three class-action experts: John P. Frank, Esq., of the Arizona bar; Professor Francis E. McGovern, of the University of Alabama School of Law; and Herbert M. Wachtell, Esq., of the New York bar.

*Herbert Wachtell* spoke first. He sketched his own background in class action litigation. His longest experience has been in securities law litigation, commonly defending. More recently, he has been involved in an attempt to use Rule 23 to accomplish an omnibus settlement of a massive asbestos litigation, appearing for a defendant who desired certification of a plaintiff class. He also has been co-chair of the Lawyers Committee for Civil Rights Under Law, and exposed to class actions from the civil rights perspective.

In the securities area, there are abuses and strike suits. There are unseemly races to the courthouse without investigation in an effort to be first in line as class counsel. But despite these problems, and properly administered, Rule 23 can work reasonably well without changes. Abuses are addressed effectively by means both procedural and substantive.

Three procedural devices have been particularly effective in securities class actions. First is rigorous enforcement of Rule 9(b) as to allegations of fraud - the Second and Seventh Circuits are on the front lines of this development. The Second Circuit requires allegation of specific facts giving rise to a strong inference of fraud. The Seventh Circuit effectively requires pleadings of who, what, when, where, and why. A second procedural device has been to expand the scope of materials that can be considered on a Rule 12(b)(6) motion to include materials referred to on the face of the complaint and public-filed documents. If, for example, the plaintiff alleges that X, Y, and Z were not disclosed, the court will consider SEC filings in which X, Y, and Z were disclosed. Third, there is a developing trend to stay

discovery if a substantial motion is made under Rule 9(b) or 12(b)(6). A discovery stay is an effective deterrent to strike suits.

On the substantive side of securities law, the short limitations period set by the Lampf case and the apparent abolition of an implied cause of action for aiding and abetting in the Bank of Denver case have been helpful.

A strong judge sensitive to abuses and willing to take control can do well with present Rule 23. Rule 23 is needed for meritorious claims; opt-outs are not really a problem in the typical securities case. It is, indeed, rare to litigate a class-action motion on the certification issue itself in a securities case; it is a foregone conclusion that a class will be certified, and if the case is settled the defendant wants it to be settled as a class action.

In mass tort cases, there is a difference between litigating and settling. Class treatment is much more appropriate for settling. If the claim is to be litigated, class certification leaves the plaintiff with no free choice and the defendant with no real chance to defend.

The recent asbestos experience is unique, or at least more different than others. The question of liability insurance coverage is being litigated in California state courts. It is common ground that if the insurers win, the insured asbestos producer will be without meaningful resources. The very real coverage dispute gives the impetus to attempt settlement, and supports the framework of a no-opt-out "limited funds" class under Rule 23(b)(1)(B). For the insurers, a no-opt-out class was a sine qua non of settlement. They were willing to put up \$3 billion only for "total peace." Total peace includes settlement on terms that preclude any third-party claims, any collateral attack, or any other exposure to additional liability. An opt-out class would pave the way for one-way intervention, depending on the apparent prospects of the California coverage litigation. The plaintiff class lawyers were not attracted to the no opt-out class. Total peace probably raised the cost of settlement, but it was worth it. Questions about the constitutionality of a no-opt-out class were studied and resolved; the Shutts case does not stand in the way. The prospect of total peace was further bolstered by supplementing the (b)(1)(B) class with (b)(1)(A) and (b)(2) classes. The defendant counterclaimed against the plaintiff class, and other defendants, to enjoin future claims by plaintiffs and claims-over by other defendants. The A.H. Robins decision in the Fourth Circuit supports the result.

Not all mass tort claims are like the asbestos case just

described, even for purposes of settlement.

As to the proposed amendments, Mr. Wachtell agreed with most of the written comments submitted by the Association of the Bar of the City of New York. Radical overhaul of Rule 23 is not desirable. The bench and bar have learned to live with Rule 23 as it is now. The proposed requirement that a class representative be willing to represent the class will do away with defendant classes. Defendant classes are essential to settle mass torts. In corporate litigation, defendant classes can serve the function of a "bill of peace" to make sure there are no more claims out there. It might be desirable, however, to find some way to compensate the unwilling defendant class representative for the additional costs of defending on behalf of a class.

Opt-in classes should not be restored. This device was abandoned for a reason.

A provision for interlocutory appeal in the sole discretion of the court of appeals is a desirable supplement to interlocutory appeal by certification of the district court and permission of the appellate court under 28 U.S.C. § 1292(b). The decision on class certification is, at times, effectively the final decision in the action. Denial leaves the representatives unable to litigate the claim, while grant forces the defendant to settle.

The suggestion that a modest amendment should be made to signal the availability of class actions in mass tort cases should be resisted. Class action treatment is desirable only for settlement, not for litigation.

It would be good to create a discretionary power to deny opt-outs in (b)(3) classes, particularly for settlement. There should be a presumption against opting out of (b)(1) and (b)(2) classes, and in favor of opting out in (b)(3) classes.

The basic notice scheme should be preserved, but the district court should be given discretion to reduce the extent of notice required in (b)(3) class actions.

*Professor McGovern* spoke next. He noted that over the course of many years of experience with class actions, often acting as special master, he has experimented with many different ideas. With accumulating experience, he has become more conservative about the answers to class action questions. Mass torts was his topic for this day.

One observation heard from many experienced class-action observers is that it does not make much difference what Rule 23 says. Judges and lawyers are result-oriented and will achieve the

results they wish without much regard for the fine points of rule text.

Other observers would say that expansion of Rule 23 tort claims will put an end to the tort system as we know it. Claims will become fungible, as so many commodities on an exchange. Administration will become much like social security disability or workers compensation proceedings.

The silicone gel breast implant cases provide a new experience. Asbestos is a "mature" mass tort with lots of accumulated knowledge. Breast implant cases are very immature: perhaps 10 cases have been tried, with results evenly divided between plaintiff and defendant victories. Most of the fact patterns have not been tried. We do not know the extent or nature of common injuries.

The transaction costs of mass tort litigation are huge. In asbestos litigation, Rand has found that less than 30% of the indemnity dollar goes to compensate plaintiffs.

In the breast implant litigation, there are two mandatory classes, a bankruptcy, a double opt-out class, and an opt-in class. One defendant has tried a (b)(1)(B) class; clearly its funds are limited in relation to the claims, and the plaintiffs decided to negotiate it because of a desire to avoid bankruptcy. This defendant was not "milked dry." Whether this was proper is not clear. Another defendant chose the bankruptcy route. Three others decided to lead the way to settlement on terms that could then be extended to others. These three want the "double opt-out" alternative. This desire arises from the immaturity of the thing - no one knows how many women will claim injuries, nor what the injuries will be. The first option is to exit the entire system, up to June 17 - the defendants then can choose to pull out if too many potential plaintiffs have opted out. The second deadline will come after a first round of claims have been processed. That experience will determine whether it is necessary to reduce the compensation "grid" to adjust awards to the available funds; once that is done, both the plaintiffs and the defendants will have a second opportunity to opt out. Foreign claimants can opt out by June 17, but then must register by December 1 if they want to stay in the class: de facto, this becomes an opt-in class. Another defendant will add to the settlement if it can get a (b)(1)(B) class certified by fall.

All of this activity in the breast implant litigation is driven by the immaturity of it. The "tail" of the cases is what gets you in mass torts - those that go on and on. What you need to do is get closure; even a significant number of opt-outs may leave it possible to define and deal with the risk of uncertainty they

represent.

Class action notices have the effect of bringing lots of claims to court. Without a class action, perhaps 10% to 20% of legitimate claims will be filed. Notice brought in lots of claims in the Dalkon Shield litigation. Once \$4,000,000 worth of notices are sent out in the breast implant litigation, much the same is likely to happen. But if there are a lot of opt-outs, the defendants will have a real problem. They are taking big risks from fear of the alternatives.

Salvation may lie not in Rule 23 but in something else.

Are class actions good or bad for tort claims? Even ATLA is deeply divided on this. There is a major argument that plaintiffs' lawyers are using Rule 23 to line their own pockets and sell out victims by sweetheart settlements. The other side is that firms who make much money representing the sickest of the sick are simply looking to protect their own positions.

*John Frank* finished the panel presentation. He began with a history of present Rule 23, noting that it is a product of the rebirth of the civil rules process in 1960. It also was a product of the civil rights movement of the 1960s. Subdivision (b)(2) was imperative; without it, the committee might not have touched Rule 23 at all. The changes were undertaken at the apogee of the Great Society. The litigation explosion had not yet come. The mass tort was wholly outside the rulesmakers' ken.

In this setting, (b)(1) was made broader than before. (b)(2) was broadened to ensure effective civil rights enforcement. And (b)(3) was broadened in the most radical act of rulemaking since the Rule 2 "one form of action" merger of law and equity.

Whether to have (b)(3) at all was a real concern. A significant fear was that big tort defendants might rig a "patsy" plaintiff class, beguiling courts into selling res judicata at a bargain price. Big business, at the time, had little stock of public trust. And there was intense sensitivity to individual rights. James W. Moore gave a circus fire as an example in which a class action would go against the grain of individual control of individual litigation. Judge Wyzanski developed the opt-out mechanism in a stroke of genius. The opt-out preserved individual autonomy, at least in the setting of small and manageable cases that the committee contemplated. It was assumed that opting out would represent the conscious choice of a person with a meaningful alternative in an individual action. Professor Kaplan, as reporter, raised the possibility of classes involving many plaintiffs; Judge Wyzanski was firm on the principle that notice should reach all class members, and also believed that the

impracticability of attempting notice would defeat certification of classes involving thousands of plaintiffs.

Subsequent history has been a story of expansion and excesses. The number of Rule 23 filings has ranged from 600 to over 1,000 in each of the last six years. More than 2,000 are pending as of 1993. The number closed has declined each year since 1988.

There have been Rule 23 successes. The comments from informal circulation of the pending Rule 23 draft show that many people are satisfied with the rule as it is. The most dramatic fact, however, is that they do not list specific successes. The number of noteworthy successes praised in the literature is small. What we hear is substantially anecdotal. The scholarly work to get beyond the anecdotal "just isn't there."

The fear that defendants would rig plaintiff classes has not materialized. They have not had to. The "take-a-dive" class has been arranged by plaintiff attorneys who settle out class claims for liberal fee recovery. As a matter of anecdotal experience, such things do indeed exist. Professor Coffey writes that Rule 23 is uniquely vulnerable to collusive settlements. The hazard is increased by the Jeff D. case. Up to then, attorney fees were separate from settlement; Jeff D. holds they can come at the same time. Professor Kane has observed that the court cannot rely on full adversary presentation on fee issues. There is no clear analysis available on the often grotesque relation between return to lawyers and return to the class.

The value of minimal recovery for class members is not established. One response has been "fluid recovery" that does not directly benefit any individual class member.

In developing Rule 23, class representation was assumed. It has become a fiction. The representative is simply one anecdotal example of the claim, a decorative figurehead. All the planning is done by class counsel.

One major problem is the "race for the gold," the competition by attorneys to grab the first class claim. The ashes of the fire — and the bodies — are still warm when the first suit is filed. These attorneys are the "parachutists."

A significant part of the pressure to do something about Rule 23 arises from the impulse to have judges take more and more control of cases.

The pressure to reduce individual notice faces constitutional questions.



There has been frequent departure from the requirement that a class certification decision be made as soon as practicable. Often a settlement is arranged and the request for certification and approval of the settlement is presented as a package. This gives class members an opportunity to "peek" before deciding whether to opt out. In turn this leads to efforts to recruit class members to rival but parallel actions, with promises that a different class action will produce results better than the first proposed settlement.

These presentations were followed by a period of discussion.

The first question went to the practical consequences of collapsing subdivisions (b)(1), (2), and (3) into mere factors to be considered in determining whether a class action is superior. The consequences tie, in part, to the decision to expand discretion in determining whether to permit opting out, an issue that itself has stirred recent litigation. Mr. Wachtell said he would leave the present structure alone. Combination of the present categories would just cause uncertainty. But he would give the court the right to deny opt-out rights when that is constitutionally permissible. Professor McGovern expressed similar concerns. The collapse would create more opportunity to decide whether a mandatory class is a good idea, a matter that will generate real concern and real resistance. Mr. Wachtell observed further that the problem with Rule 23 as a mass tort device is the huge oppression of the defendant even if there is an opt out. In litigation, as contrasted to settlement, Rule 23 maximizes the importance of disparate issues in mass tort claims. Increased use for settlement, however, is desirable and should include the power to deny opt-outs. The Shutts decision does not speak to the constitutionality of mandatory classes for federal courts, at least as to plaintiffs in the United States.

A related observation was that some of the concerns might be a function of aggregation more than class action certification, that large numbers of marginal cases can have a real nuisance potential. Mr. Wachtell responded that yes, there is a force that makes the merits irrelevant. Professor McGovern noted that he acted as special master in one litigation with 4,000 consolidated cases in which the plaintiffs refused class treatment. The cases settled - and were promptly followed by 26,000 more related cases. Mr. Wachtell added that at some point defendants are prepared to put an end to all claims, meritorious and nonmeritorious, by settlement. Notice and opportunity to be heard is enough without allowing opt-outs. There is a real problem of developing a mechanism to get rid of these mass cases. The rule should not be more restrictive than due process limits.

The next question went to the means of drafting a class action

rule that distinguishes between settlement and litigation of the class claims. Mr. Wachtell responded that it is not difficult. The court need certify only on settlement. It is a good thing to arrange the terms of settlement before deciding whether to certify. The decision whether to opt out is better-informed then. All that needs be done to Rule 23 is to add a sentence or two to (b)(3) authorizing denial of opt-out rights in appropriate cases. The text of the rule might even refer to settlement.

Another question was whether the draft Rule 23 would help dispose of mass tort actions. Professor McGovern answered that in large part the proposal simply recognizes what courts are doing now. At the same time, some people will read it to make changes. Mr. Frank added the committee must bear an enormous responsibility on this topic. Someway, somehow, we must have a way to dispose of mass disputes. Rule 23 was not framed for this. We need to go back to the very beginning on this issue. In addition, abuses of Rule 23 are rising. There are hundreds of relatively small class actions that do impose burdens on the court system, and considerable burdens.

Mr. Wachtell observed that he had been involved in a fair share of strike suits, and settlements to get rid of them. It is his strong feeling that the cases in which the attorney gets rich and the class gets little are based on weak claims. But there are success stories. The Washington State power litigation counts as one.

Mr. Frank suggested that the first question is to identify the aggregate litigation that needs to be handled on a mass basis. Then the question is how will we do it. It may be desirable to do something that will ensure real representation of the class independent of the lawyers. And his "most radical belief" is that it is desirable to exclude some kinds of mass claims from class-action treatment - the case should not be there at all unless there are damages of at least \$25 or \$50 for each class member. There should be some kind of system for aggregating mass cases, perhaps by way of 28 U.S.C. § 1407. The method should be as narrow as it can be.

In response to a question about experience in civil rights cases, Mr. Frank stated that before 1966, (b)(2) certification was at times rejected for civil rights cases. Now it works. Mr. Wachtell added that in many civil rights cases today a defendant class is needed - as for example nonminority employees in an employment discrimination case. He repeated his caution that the draft Rule 23 requirement that there be a "willing" class representative would be a big barrier to this. He also observed that the need for defendant classes is another reason for amending Rule 23 to allow a court to limit the right to opt out.

Turning again to mass tort cases, Mr. Wachtell repeated his view that class treatment is appropriate for settlement. Professor McGovern added that a common-issue trial is an appropriate use for Rule 23, but there is not enough commonality for other issues. He also noted that if a liability class had been certified in the breast implant litigation, it would have made settlement harder. Mr. Wachtell responded that it is important to consider the sequence of cases. Litigating mass claims often is an evolutionary process, with more evidence available after there have been several trials. The ordinary sequence is that plaintiffs win some cases and lose others before things shake out. It would be undesirable to stake everything on a single and first trial.

The final observation was that at least in the Eastern District of Pennsylvania, much has been accomplished without class certification by voluntary reliance on the first litigation of issues as settling common matters.

Following the panel discussion, the committee turned to formal consideration of the pending Rule 23 draft. It began with recognition that all alternatives remain open. The draft has been polished to a form that could be sent forward to the Standing Committee with a recommendation for publication for comment. This Committee is not committed to any amendment of Rule 23, on the other hand, and could conclude that the time is not yet ripe. And the alternative of further study, reconsidering matters once put aside and perhaps considering new approaches, remains open.

Several forces were seen at work in the present pressures surrounding Rule 23. Class actions respond to powerful forces, some of them indirect. Reduction of the barriers to lawyer advertising has facilitated case solicitation. Substantive law is in flux in some areas, particularly products liability. Courts have been willing to accommodate the phenomenon of aggregation that is not a "dispute" in any traditional sense, but a commodification of torts. The claimants are treated not as distinct cases but as fungible units; the process does not change the nature of individual claims, but there is a drastic change in the relationship between counsel and "clients" who are, as individuals, often completely unknown to counsel. The old "equitable" class actions have long been with us, on the other hand, representing principles far older than (b)(3) classes. They provide a reservoir of traditional power that we must not give up. It is a powerful history.

It is not enough simply to decide to "study" the problem. We need a more active approach, a program that focuses on aggregation more generally than Rule 23 categories alone. Scholarship and empirical research can be brought to bear.

With this introduction, it was observed that the real choice is between doing nothing and doing something fairly significant. Some of the significant possibilities lie beyond the reach of the Rules Enabling Act process. Multidistrict consolidation, for example, depends on statute. Admiralty principles - which seem to work well in a concurso of claims against a fixed fund - involve matters of substance that can be generalized only by Congress. There are, on the other hand, routine and successful uses of Rule 23 that should not be upset. Rule 23 abuses seem often to be in the role of attorneys; perhaps that can be addressed. And perhaps a set of important structural ideas can be generated. Courts now are cast in the role of filling a vacuum; the question is what alternative procedural, structural, or nonjudicial means might better fill the vacuum.

In the same vein, it was noted that such matters as jurisdictional limits on diversity class actions must be addressed by Congress. This, and related matters, have been extensively considered in the Complex Litigation project of The American Law Institute.

Another observation was that the draft Rule 23 amendments seem pretty good at the level of fairly modest detail. On a larger scale, the ongoing discussion did not seem to show much support for trial of the truly mass problems. These problems may be better suited for an administrative approach, as social security disability is. The present draft might better be changed to require that common factors predominate for any class action - this would eliminate asbestos, lead paint, and like mass injury cases. Further discussion of the draft suggested that although it may be true that it describes much of what is happening now, it would invite more changes in practice. What is happening now, however, is driven by the strong compulsion to settle, recognizing that there are risks in resting the settlement classes on the present rule. It also was suggested that changes in Rule 23 may make sense even if they are made part of a larger project to reevaluate various forms of consolidation and alternatives to current rules of jurisdiction and even court structure. At the same time, it was noted that rules changes should not be made simply in anticipation of supporting legislation that had not yet been enacted.

In response to these observations, it was asked whether a new rule might be created apart from Rule 23, governing aggregated cases. Such a rule might be aimed at means of achieving and administering settlements, not trials. It was suggested that it would be strange to build a rule that contemplates the elimination of trials - that an agency for mass justice would be a better means of removing the ill-suited burden of administering mass justice from a court system designed for individual justice. A different kind of court also was suggested, on the theory that a regular

judge swept into massive consolidated litigation would not be able to do anything else.

In the same vein, it was suggested that the problem is in the mass tort area. Single-event disasters are well-suited to class treatment. A recent illustration of events that are not well-suited to class treatment is provided by an attempted class action on behalf of all cigarette smokers who have become addicted.

The aggregation problem, it was noted, often begins with the filing of many individual actions, not class actions. Aggregation of those actions leads to the same problems.

The question of rules designed for settlement arose again. In the present system there is a fear of trial. The fear of trial causes lawyers, not judges, to arrange the settlement. The clients want to achieve certainty and repose, to get out from under. If there is no settlement, some of the cases will go to trial. The transaction costs, however, are enormous.

These reflections led to discussion of the question whether the Civil Rules can establish adequate answers to the problems of aggregating large numbers of related claims. There is little organized information on what is happening. The ALI Complex Litigation project approaches statutory means of consolidation. The procedural devices to be employed after consolidation are not explored. The answers may lie with Congress, or perhaps in devices that require cooperative development involving both Congress and the Enabling Act process. One possibility may be creation of a claims-administration structure that litigants can agree to opt into.

The concluding portions of this discussion turned to the need for further information. It was agreed that more must be known about probable effects before proposing rule changes. An effort should be made to develop a study that will reveal more of what Rule 23 does in its present operations. 28 U.S.C. § 331 requires the Judicial Conference to carry on a continuous study of the operation and effect of the general rules of practice and procedure. Rule 23 is a suitable subject of such study. A subcommittee will be formed to undertake development of a research program, working initially with the Federal Judicial Center.

#### *Rule 64*

The Committee has earlier reviewed an American Bar Association proposal that Rule 64 be amended, in conjunction with new federal legislation, to provide federal standards for prejudgment security and to establish nationwide effects for security orders. Phillip Wittmann reported that he had met with a representative of the ABA

section to discuss the proposal further. His conclusion was that the proposal involves a morass of issues of substantive law and the relationships between federal and state law that is well beyond the scope of the Rules Enabling Act. Amendment of the Civil Rules should be deferred until Congress acts on the substantive issues. The Committee unanimously accepted the recommendation that the proposal be dropped for now.

#### *Rule 68*

Discussion of Rule 68 began with presentation by John Shapard of the preliminary results of the Federal Judicial Center survey of settlement experience. The survey was divided into two parts. The first part drew from 4 matched sets of 200 cases each, 100 of which settled and 100 of which went to trial. The effort was in part an attempt to learn more about the factors that foster or thwart settlement, and in part to learn the reactions of practicing attorneys to possible changes in Rule 68. The questions to be tested were whether there is reason to cling to the hope that strengthened consequences might make Rule 68 an effective tool to increase the number of cases to settle, to advance the time at which cases settle, and to reduce misuse of pretrial procedures lest the misuser be forced to pay attorney fees incurred by the adversary. The concerns about strengthened consequences also were tested in an effort to determine whether the rule might force unfair settlements on financially weak parties or might cause trial of some cases that now settle. The second part of the survey used a different questionnaire for 200 civil rights cases, in which present Rule 68 has real teeth because of its effect on recovery of statutory attorney fees.

The questionnaire used in the general survey took two approaches. One, and likely the more useful, was to ask counsel about what happened and what might have happened in their actual cases. The second was to ask counsel for general opinions. It is an important caution that only first-round responses are available, with a 30-35% response rate. As an illustration of a strengthened Rule 68, the questionnaire posited a sanction of one-half of post-offer attorney fees. At this stage of response, there is evidence that approximately 25% of the attorneys responding for cases that went to trial believed that a strengthened Rule 68 might have led to settlement, and approximately 25% of the attorneys responding for cases that settled believed that a strengthened Rule 68 might have led to earlier settlement.

In specific cases, there was a wide variation of plaintiff and defendant settlement demands. In tried cases in which counsel for both sides responded - a total of 22 cases - there were three that apparently should have settled because of overlap between the demands of plaintiff and defendant. The problem may have been

failure of communication-negotiation, or it may have been divergence between the settlement views of counsel and clients.

The answers for the civil rights cases were comparable to other cases on many questions. But there was polarization on some questions. Defendants want Rule 68 strengthened, and plaintiffs would be happy to abolish it. These answers reflect the fact that defendants and plaintiffs both understand the way Rule 68 works today in litigation under attorney fee-shifting statutes.

The information about expenses incurred in responding to pretrial requests is one important result of the survey.

Mr. Shapard responded to a question by stating that if he were writing the rule, he would try to give it teeth for both sides, without upsetting the fee-shifting statutes. He would be encouraged by the survey responses to proceed on a moderate basis to allow offers by both plaintiffs and defendants, with greater consequences such as shifting 50% of post-offer attorney fees. Although it would be more effective to avoid any cap on fee-shifting, it is a political necessity to adopt a cap that protects a plaintiff against any actual out-of-pocket liability for an adversary's attorney fees.

Another question asked about the element of gamesmanship that might be introduced by increasing Rule 68 consequences, leading to strategic moves designed to control or exploit this new element of risk rather than to produce settlement. Mr. Shapard recognized the risk, but observed that we can create a new set of game rules. Although there are cases that the parties do not wish to compromise, most cases settle because of the economics of the situation. A changed game will only lead to getting better offers on the table.

Mr. Shapard also suggested that this survey will provide about 90% of what might be learned by empirical research. There is a growing body of theoretical research as well. Some states have rules that might be considered in the effort to gain additional empirical evidence of the effects of enhanced consequences.

It was asked what might be done to generate positive incentives for plaintiffs in fee-shifting cases, since they get fees if they win without regard to Rule 68. Mr. Shapard replied that this was uncertain, although expert witness fees might be used as a consequence if they are not reached by the fee-shifting statute. Another possibility would be to allow an increment above the statutory fee.

It was observed that some lawyers would like to abolish Rule 68. Mr. Shapard suggested that this would be of little consequence

in comparison to present practice, apart from statutory fee-shifting cases, since Rule 68 is little used. In civil rights fee-shifting cases, on the other hand, the survey shows that Rule 68 was used or had an effect in about 20% of the cases.

Mr. Shapard also noted that it may be possible to correlate the answers on the reasons for not settling with other answers about the nonsettling cases to learn more about the possible consequences of strengthening Rule 68. There still are cases that go to trial, and they are not all contract litigation between large enterprises.

Discussion turned to the relationships between Rule 68 and attorney-fee arrangements. The "cap" in the current draft would avoid the problem of liability for defense attorney fees in an action brought by a plaintiff under a contingent-fee arrangement. Without the cap, it would be necessary to determine whether the plaintiff or the attorney should be responsible for this out-of-pocket cost. Plaintiff liability would have a dramatic effect on the character of contingent-fee representation. The effect on fee-shifting statutes also was noted. This effect extends beyond "civil rights" litigation to reach any fee-shifting statute characterized in terms of "costs." The view was expressed that using Rule 68 to cut off the right to post-offer statutory fees violates the Rules Enabling Act, notwithstanding the contrary ruling in *Marek v. Chesny*, and that the violation cannot be cured by the semantic device of referring to the result as a "sanction." There is no preexisting procedural duty to settle that supports denial of a fee award. We should not continue the violation of the Enabling Act in an amended Rule 68. Similar doubts were expressed about Enabling Act authority to adopt attorney-fee shifting as a sanction in more general terms.

More general discussion followed. One view was that there is little reason to suppose that it is desirable to foster earlier and more frequent settlements by means of Rule 68. Litigants with vast resources have too many advantages in our system, and their advantages would be entrenched and exacerbated by strengthening Rule 68. A supporting view was that the Judicial Center survey does not change the case against expanding the rule. On the other hand, it might be an undesirable symbol to abrogate the rule.

One possible problem with the survey was suggested: many of those who did not respond may have been worried about their freedom to answer the questions. Even with pledges of anonymity, client permission should be sought, and there is still some concern about loss of confidentiality. Another concern is that the first question about alternative sanction systems did not provide for indicating second choices.



Experience with the California practice was again recalled. California includes "costs" in the offer-of-judgment sanctions, and costs commonly include expert witness fees. The rule seems to exert a real influence on settlement. It also is helpful in effecting settlement pending appeal because the cost award is a useful bargaining item. One conclusion was that the Committee should find out more about the actual operation of the California practice as a more modest means of encouraging acceptance of offers.

Mr. Sherk was asked to describe experience with Arizona Rule 68. Starting with a rule like Federal Rule 68, the Arizona rule was first amended to make it bilateral. Then, noting that an award of costs does not provide a meaningful benefit to a plaintiff who has prevailed to the extent of doing better than its offer of judgment, stiffer sanctions were adopted. The rule has become more complicated, and is difficult to administer.

Professor Rowe described his ongoing research of the effects of different attorney fee sanctions by means of a computer simulation exercise sent to practicing attorneys. One of the hypotheses is that significant sanctions will smoke out more realistic offers, which will ease the path to settlement. Another concern to be tested is the effect of "low-ball" offers on risk-averse and poorly financed parties. One preliminary result of the research is that in a significant minority of cases there also can be a "high-ball" effect in which significant sanctions encourage defense attorneys to accept high plaintiff demands. The explanation may be that a defending lawyer hates to have to tell the client that the client must pay the plaintiff's attorney fees. Another effect is that substantial sanctions give poor plaintiffs the means to bring claims that are strong on the merits for relatively small amounts.

The observation that present Rule 68 can operate to distort relations between attorneys and clients in statutory fee-shifting cases led to the question whether a system that allows for offers by plaintiffs as well as by defendants might lead to arrangements in which clients insist that lawyers bear the cost of Rule 68 sanctions.

Note was made of a quite different sanction possibility. Founded on the premise that many contingent-fee cases do not involve any significant risk that the plaintiff will take nothing, this suggestion would limit plaintiffs' attorneys to hourly rates for post-offer work that leads to recovery of less than a Rule 68 offer.

The conclusions reached after this discussion were, first, that the current draft proposal should not now be presented to the

Standing Committee. Second, Rule 68 should remain under consideration, including study of the effects on fee-shifting statutes, alternative sanctions such as awards of expert witness fees or restrictions on contingent fees, and abrogation of Rule 68. The Federal Judicial Center study will be completed and considered further. The Committee expressed its great appreciation for the work and help of the Judicial Center.

### *New Rules Projects*

#### *Rule "16.1": Pretrial Masters*

An initial draft Rule 16.1 was prepared in response to the decision at the last meeting to address the use of pretrial masters. In presenting the draft, the Reporter noted that it is preliminary in several ways. First, it is simply the first step in considering the ways in which the rules might be amended to address the use of masters. Rule 53 is silent not only with respect to pretrial masters but also with respect to post-trial masters. It is useful to set out a number of provisions in a separate pretrial master draft for purposes of illustration, but the long-run drafting solution may be quite different. Perhaps pretrial, trial, and post-trial masters could all be covered in a revised Rule 53. More likely, a number of common provisions could be incorporated in Rule 53, to be incorporated by reference in brief separate rules for pretrial and post-trial masters. Second, the draft includes many provisions that may not be necessary or even desirable in a final product. It is easier to include possible topics for deletion than to describe omitted topics for possible inclusion. The provision for using magistrate judges as masters is an illustration of this phenomenon, borrowed from present Rule 53 and 28 U.S.C. § 636(b)(2). Third, it is difficult to develop a comprehensive picture of pretrial master practice from reported cases and secondary literature. These sources contain many tantalizing hints of practices that are not fully described. More needs to be known about current practice – and possible problems with it – before a comprehensive draft can be developed.

Discussion of the provisions for appointing magistrate judges as pretrial masters quickly led to the conclusion that these provisions are unnecessary. Apart from the provision for performing any duties agreed to by the parties, magistrate judges can discharge the duties described in the draft in their roles as magistrate judges. This provision adds nothing, and could contribute to confusing the distinctive roles of master and magistrate judge. It will be deleted.

In approaching the general topic, the need for a rule was suggested in at least two dimensions. Care must be taken in appointing special masters for pretrial purposes, although the

tests well may be different from those used for trial appointments. Masters add cost, may cause delay, and often are not experienced in the judicial role. Second, specific provisions are needed to regularize and discipline the process. It helps to address such matters as the occasions and standards for appointment, scope of permissible duties, the need for clear directions, the scope of review, and related matters.

The standard allowing appointment of a pretrial master if the master's duties cannot be adequately performed by an available magistrate judge will be expanded to refer to district judges as well as magistrate judges. The drafting may spell out the reference, or may combine both offices into a reference to judicial officer. It was not decided whether the standard should include judges and magistrate judges from other districts - "if the master's duties cannot be adequately performed by an available district judge or magistrate judge of the district."

It was suggested that the requirement that a master advance the action be modified to require substantial improvement: "a master will advance substantially the just, speedy, \* \* \*."

The need to use special masters for pretrial purposes was reviewed. Some pretrial purposes not listed in the draft rule approach trial, and probably should be governed by Rule 53 - a preliminary injunction hearing was given as an illustration of a matter that would justify reliance on a master only in exceptional circumstances. In some courts, at least, there is a real need to rely on pretrial masters to handle the caseload. And there may be cases in which the special knowledge of a master may prove invaluable; an example was given of the frequent use of a single person as special master in a series of cases involving leaking underground storage tanks. In some cases the parties may readily consent to appointment of a master to facilitate litigation. One member noted a pending case in which the parties had requested appointment of two discovery masters to rule on deposition disputes. The rule, however, is not designed to invite unthinking reliance on pretrial masters. Nor will consent of all parties always be sufficient to justify appointment of a master.

Application of the Code of Conduct for United States Judges to masters was explored briefly. It was decided that no attempt would be made to adopt parallel - or divergent - conduct provisions in any rule that may be proposed.

The question of ex parte communications between master and the parties was raised. There was strong support for the view that the draft should address the topic. It was urged that ex parte communications with the parties should be allowed only in cases in which the master is limited to settlement matters, but this

question was not resolved.

It was noted that the draft does not require that a pretrial master be an attorney. Discussion suggested that in some situations it may be desirable to appoint experts from other fields, such as economists or accountants.

Questions were raised whether the rule should provide explicitly for objecting to the appointment of any master and to the appointment of a specific person as master. It was noted that at times there is at least an appearance of "cronyism" as the same person is repeatedly appointed by a single judge. This observation led in turn to the question whether the rule should prohibit a master from appearing before the appointing court during the period of the master appointment.

The provision in draft subdivision (b)(2) might be expanded by adding a reference to unjustifiable burdens: "will not impose an unfair or unjustifiable burden on any party." The thought is that even if all parties are well able to bear the expense of a master, so there is no unfairness in that sense, the expense still may not be justified by the needs of the case.

It was concluded that a revised draft should be prepared in light of the discussion, and reviewed by one or two committee members before seeking informal advice from a few nonmembers. Further work will be done on post-trial masters, with the hope that one result will be a better sense of the best overall structure for provisions dealing with masters. The question whether the rule and Note should be shortened will continue to be reviewed as well.

#### *"Rule 77.1": Sealing Orders*

In response to directions at the October 1993 meeting, a sketch was prepared for a possible rule dealing with orders limiting public access to judicial records or proceedings.

The sketch described briefly the variety of materials or events that have been treated under "sealing" orders, and the overlapping First Amendment and common-law principles that have regulated this practice. A rule might address each of two quite different topics. One is the standards for limiting access that have gradually emerged from the incremental process of adjudication. Different standards might be tailored for each of several different categories of material, or a single standard might be developed for all categories. Access to pleadings, for example, might be treated differently than access to trial. The other topic is the procedural incidents of sealing orders, dealing with such matters as notice and hearing; standing to resist closing or to seek access; the need for specific findings on the matters

Minutes  
Civil Rules Advisory Committee  
April 28 and 29, 1994

that control the access decision; and the specificity of the sealing order as to matters sealed, duration, and modification or dissolution.

The discussion focused primarily on the distinction between discovery protective orders and all other sealing orders. Discovery protective orders reflect the broad scope that has permitted discovery to range well beyond matters admissible in evidence, and have been an important counterbalance guarding against unnecessary invasions of privacy that could not be invaded for other purposes and that need not be surrendered as part of the process of judicial decision. The question was raised whether the general topic of public access should be addressed by a formal rule of procedure. In addition to First Amendment constraints, some issues may involve substantive concerns; the confidentiality of private or public settlement agreements is one example.

It was concluded that the time had not come for further study of the general public access topic.

#### *Public Rules Suggestions*

##### *Rule 4*

Joseph W. Skupniewitz, Clerk for the Western District of Wisconsin, suggested two revisions in Civil Rule 4. New Rule 4(c)(1) makes the plaintiff responsible for service "within the time allowed under subdivision (m)." As compared to former practice, this has encouraged some plaintiffs to take advantage of the full 120-day period, producing delays in the early stages of case processing. Rule 4(c)(2) carries forward the provision for service by the marshal in forma pauperis actions; new Rule 4(d), however, transforms the former "service by mail" provisions into a procedure for requesting waiver of service. It is not clear whether a marshal may request waiver of service, nor whether it would be wise for a marshal to undertake to evaluate the consequences of requesting waiver. The Committee concluded that it is premature to reconsider the details of Rule 4 so soon after the December 1, 1993 effective date of the new rule.

Michael Marks Cohen, Esq. wrote that the provisions of new Rule 4(i)(1) and (3) conflict with the provision for serving the United States Attorney and the Attorney General in the Suits in Admiralty Act, 46 U.S.C.A. § 742. The statute may cause confusion for the unwary. The Committee concluded that there is no need for official action recommending amendment to Congress. It is sufficient to ask the Administrative Office to bring this question to the attention of Congress.

#### *Prefiling Conference And Disclosure*

William F. Raisch, Esq., wrote to suggest new rules that would do two things. First, any party filing a claim must certify that before filing it had conferred or attempted to confer with the defending parties in an effort to settle or invoke alternate dispute resolution mechanisms. Second, the pleading must be disclosed to the defending parties before filing, subject to exceptions to accommodate problems with statutes of limitations or evasion of effective remedies. The Committee decided that this topic does not at present warrant a place on the agenda.

*Rule 26: Interviewing Former Employees of a Party*

John E. Iole and John D. Goetz urged consideration of the proposal advanced in their article, *Ethics or Procedure? A Discovery-Based Approach to Ex Parte Contacts with Former Employees of a Corporate Adversary*, 1992, 68 Notre Dame L. Rev. 81-132. The Committee concluded that the possibility of adopting a discovery approach to ex parte contacts with former employees of a corporate adversary — a matter traditionally viewed as a matter of professional responsibility rules — comes too soon after the 1993 Rule 26 amendments.

*Rule 37(b)(2)*

Professor Florence Wagman Roisman pointed out that the 1993 amendment of Rule 26(f) may cause confusion in the language of Rule 37(b)(2) authorizing sanctions "if a party fails to obey an order entered under Rule 26(f)." Rule 26(f) no longer explicitly refers to entry of an order. Rule 26(f) discovery plans agreed upon by the parties, however, may well include entry of orders that should be subject to direct enforcement under Rule 37(b)(2) without need for preliminary resort to Rule 37(a). As with the Rule 26 suggestion, the Committee found it too early to revisit the 1993 amendments.

*Rule 62*

Deputy Associate Attorney General Tim Murphy wrote that many judgment debtors fail to understand that a judgment becomes due upon expiration of the automatic 10-day stay provided by Rule 62(a), absent a further stay. Many also do not understand the means of effecting payment of a judgment in favor of the United States. He urged that these problems should be addressed. The Committee found no need to amend the rules to deal with matters so clearly resolved by present practice.

*Style Project*

Several changes were made in the Style Subcommittee draft of Rule 31.

Minutes  
Civil Rules Advisory Committee  
April 28 and 29, 1994

31

Discussion of Rule 32 began with the suggestion that the first paragraph of the present rule should be restored. Many members of the committee found significant difficulties with the redrafted Rule 32, however, and it was concluded that it would be unwise to undertake detailed review of the rule without the assistance of Bryan Garner, the consultant to the Subcommittee.

Respectfully submitted,

Edward H. Cooper, Reporter